

OFFICE OF ADMINISTRATIVE LAW

300 Capitol Mall, Suite 1250
Sacramento, CA 95814
(916) 323-6225 FAX (916) 323-6826
E-Mail: staff@oal.ca.gov

SUSAN LAPSLEY
Director



Date: August 1, 2008

To: James White

From: Chapter Two Compliance Unit

Subject: **2008 OAL DETERMINATION NO. 17(S)**
(CTU2008-0605-01)
(Summary Disposition Issued pursuant to Gov. Code, sec. 11340.5; Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation a Memorandum titled
"Restitution Requirement for Out-of-State Inmates"

On June 6, 2008, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether a Memorandum titled "Restitution Requirement for Out-of-State Inmates" (Memorandum) is an underground regulation. The Memorandum is dated August 21, 1996 and is signed by the Deputy Director of the Institution Division of the California Department of Corrections and Rehabilitation (CDCR). The Memorandum states that CDCR is

...mandated to collect funds from an inmate's wages and trust account deposits in response to a restitution obligation imposed by the courts. ... In the event the inmate desires to participate in an out-of-state prison placement, [CDCR] must ensure all restitution obligations are resolved prior to consideration to participate in the Interstate Correction Compact (ICC) transfer process.

....

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600, which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).¹ Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

Generally, a rule which meets the definition of a "regulation" in Government Code section

¹ Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (a):

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

11342.600² is required to be adopted pursuant to the APA. In some cases, however, the Legislature has chosen to establish exemptions from the requirements of the APA. Pursuant to Government Code section 11340.9(f) the APA does not apply to a regulation that embodies the only legally tenable interpretation of a provision of law. The California Supreme Court discussed the “only legally tenable interpretation” exception in *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 328, 132 P.3d 249. The court stated:

...the exception for the lone “legally tenable” reading of the law applies only in situations where the law “can reasonably be read only one way” (1989 Off. Admin. Law Determination No. 15, Cal. Reg. Notice Register 89, No. 44-Z, pp. 3122, 3124), such that the agency's actions or decisions in applying the law are essentially rote, ministerial, or otherwise patently compelled by, or repetitive of, the statute's plain language. (See Cal. Law Revision Com. com., 32D West's Ann. Gov.Code (2005 ed.) foll. § 11340.9, p. 94; 1989 Off. Admin. Law Determination No. 15, Cal. Reg. Notice Register 89, No. 44-Z, pp. 3124-3131 [reviewing an agency interpretation of the law for compliance with the APA and concluding that although the agency had a “well-supported” rationale for its view, its was not the only legally tenable interpretation of the pertinent statute].)

Penal Code section 2085.5 requires the Secretary of CDCR to enforce an order of restitution or a restitution fine made against an inmate.³ The section specifies several sections of various codes under which an order or fine of restitution may be made and the amount the Secretary may deduct from the inmate's wages or trust account.

² “Regulation” means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

³ Penal Code section 2085.5 states in part:

(a) In any case in which a prisoner owes a restitution fine imposed pursuant to subdivision (a) of Section 13967 of the Government Code, as operative prior to September 28, 1994, subdivision (b) of Section 730.6 of the Welfare and Institutions Code, or subdivision (b) of Section 1202.4, the Secretary of the Department of Corrections and Rehabilitation shall deduct a minimum of 20 percent or the balance owing on the fine amount, whichever is less, up to a maximum of 50 percent from the wages and trust account deposits of a prisoner, unless prohibited by federal law, and shall transfer that amount to the California Victim Compensation and Government Claims Board for deposit in the Restitution Fund in the State Treasury. Any amount so deducted shall be credited against the amount owing on the fine. The sentencing court shall be provided a record of the payments.

(b) In any case in which a prisoner owes a restitution order imposed pursuant to subdivision (c) of Section 13967 of the Government Code, as operative prior to September 28, 1994, subdivision (h) of Section 730.6 of the Welfare and Institutions Code, or subdivision (f) of Section 1202.4, the Secretary of the Department of Corrections and Rehabilitation shall deduct a minimum of 20 percent or the balance owing on the order amount, whichever is less, up to a maximum of 50 percent from the wages and trust account deposits of a prisoner, unless prohibited by federal law. The secretary shall transfer that amount to the California Victim Compensation and Government Claims Board for direct payment to the victim, or payment shall be made to the Restitution Fund to the extent that the victim has received assistance pursuant to that program. The sentencing court shall be provided a record of the payments made to victims and of the payments deposited to the Restitution Fund pursuant to this subdivision.

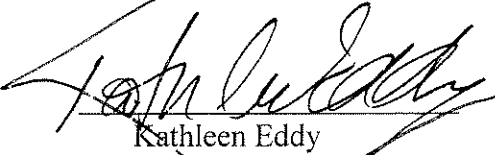
Transfers of inmates to other states are governed by the Interstate Corrections Compact (ICC) found in Penal Code section 11189. The ICC does not address the issue of enforcement of an order of restitution or a restitution fine.

If an inmate is transferred to a receiving state, the rights and responsibilities of the receiving state are found in the ICC. The ICC does not discuss the responsibility of the Secretary of CDCR to enforce an order of restitution or a restitution fine or delegate that responsibility to the receiving state. As a result, there is no process or mechanism or procedure for the Secretary of CDCR to use to enforce or collect upon an order of restitution or a restitution fine if the inmate is transferred out of state. For the Secretary of CDCR to fulfill the responsibility of enforcing an order of restitution or a restitution fine required by Penal Code section 2085.5, the inmate must be in California and may not be transferred to the jurisdiction of another state.

Therefore, the Memorandum you challenge as an underground regulation constitutes the only legally tenable interpretation law and is exempt from compliance with the APA pursuant to Government Code section 11340.9 (f). The Memorandum is not an underground regulation.⁴

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.


SUSAN LAPSLEY
Director


Kathleen Eddy
Senior Counsel

Copy: Matthew Cate, Secretary
Marilyn Kalvelage, Chief Classifications Unit
Timothy Lockwood, Chief, RPMB

⁴ For these reasons, pursuant to subdivision (f)(2)(E) of section 270, your petition is the proper subject of a summary disposition letter. California Code of Regulations, Title 1, section 270, subdivision (f) provides:

- (f)(1) If facts presented in the petition or obtained by OAL during its review ... demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be used to conclude that a challenged rule is an underground regulation.
- (2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:
- (A) The challenged rule has been superseded.
 - (B) The challenged rule is contained in a California statute.
 - (C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.
 - (D) The challenged rule has expired by its own terms.
 - (E) **An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule. (Emphasis added.)**